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No. 97-1992

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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DOCKET ENTRIES FOR *VAUGHN L. MURPHY v. UNITED PARCEL SERVICE*, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DOCKET NO. 96-3380, AS OF JANUARY 22, 1999

<u>Date</u>	<u>Proceedings</u>
11/26/96	[989782] Civil case docketed. Preliminary record filed. DATE RECEIVED: 11/25/96. Transcript order form due 12/26/96 for Dorothy J. Sheeley-Seel pursuant to R. 42.1, Docketing statement due 12/6/96 for Vaughn L. Murphy, Notice of appearance due 12/6/96 for UPS, for Vaughn L. Murphy. (kjs)
12/4/96	[994413] Notice of appearance filed by Kirk W. Lowry as attorney for Vaughn L. Murphy. CERT. OF INTERESTED PARTIES (y/n): n (lwb)
12/4/96	[994416] Notice received from Appellant Vaughn L. Murphy that a transcript is not necessary for this appeal. (lwb)
12/4/96	[994417] Docketing statement filed by Vaughn L. Murphy. Original and 4 copies c/s: y. (lwb)
12/9/96	[993063] Filed notice record is complete 12/5/96 Appellant's brief and appendix due 1/14/97 for Vaughn L. Murphy. (ab)
12/18/96	[995609] On the court's own motion and pursuant to 10th Cir. R. 33.1, order filed by (PF) to extend time to file appellant's brief until 1/28/97 for Vaughn L. Murphy. Appellant's appendix due 1/28/97 for Vaughn L. Murphy. Parties served by mail. (ab)

Docket Entries

1/16/97 [1014179] Notice of appearance filed by James R. Holland, Brian J. Finucane as attorney for UPS. CERT. OF INTERESTED PARTIES (y/n): n (kjs)

1/21/97 [1002301] On the court's own motion and pursuant to 10th Cir. R. 33.1, order filed by (PF) to extend time to file appellant's brief until 2/27/97 [96-3380] Appellant's brief due 2/27/97 for Vaughn L. Murphy, Appellant's appendix due 2/27/97 for Vaughn L. Murphy. Parties served by mail. (mt)

1/27/97 [1004000] Case settlement conferencing terminated. (lwb)

3/3/97 [1013056] Appellant's brief filed by Vaughn L. Murphy. Original and 7 copies. c/s: y. Served on 2/27/97; Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 454. Appellee's brief due 4/1/97 for UPS. (kjs)

3/3/97 [1014221] Amicus brief filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y Oral Argument? y (ab)

3/3/97 [1014224] Notice of appearance filed by Paula R. Bruner as attorney for Equal Employment. CERT. OF INTERESTED PARTIES (y/n): n (ab)

3/27/97 [1020876] Appellee's motion to extend time to file appellee's brief until 4/22/97 filed by UPS. Original and 3 copies. c/s: y (ab)

Docket Entries

3/28/97 [1020877] Order filed by PF granting Appellee's motion to extend time to file brief until 4/22/97 for UPS. (20 day extension) Parties served by mail. (ab)

4/17/97 [1027057] Appellee's motion to extend time to file appellee's brief until 5/2/97 filed by UPS. Original and 3 copies. c/s: y (ab)

4/18/97 [1027059] Order filed by PF granting Appellee's motion to extend time to file brief until 5/2/97 for UPS. NO FURTHER EXTENSIONS. Parties served by mail. (ab)

5/5/97 [1031863] Appellee's deficient brief filed by UPS. Appellee's corrected brief due 5/19/97 for UPS (kjs)

5/12/97 [1032788] Rules violation warning letter sent to James R. Holland for Appellee UPS. (sls)

5/14/97 [1035044] Appellee's brief filed by UPS. Original and 7 copies. c/s: y. Served on 5/13/97; Oral Argument? y. Appellant's optional reply brief due 5/30/97 for Vaughn L. Murphy. (kjs)

7/7/97 [1049350] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y (lwb)

8/6/97 [1057306] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y (ab)

Docket Entries

8/8/97 [1058051] Appellee's supplemental authority filed by UPS. Original and 7 copies. c/s: y (lwb)

9/9/97 [1066561] Hearing set for Nov. 1997 Session, at Denver, Colorado. (ss)

9/12/97 [1067542] Appellee's supplemental authority filed by UPS. Original and 7 copies. c/s: y (lwb)

9/16/97 [1068783] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y (lwb)

10/7/97 [1073979] Motion to present oral argument [96-3380] filed by Equal Employment. Original and 3 copies. c/s: y (lwb)

10/8/97 [1074600] Motion to present oral argument filed by Amicus Curiae Equal Employment submitted to panel. (sls)

10/10/97 [1075462] Appellant's settlement conference report filed. Original and 0 copies (mt)

10/14/97 [1075627] Order filed by PF granting motion of amicus curiae to present oral argument [1073979-1]. Parties served by mail. (sls)

11/17/97 [1084487] Case argued and submitted to Judges Seymour, Anderson, Henry. (sls)

11/19/97 [1085973] Supplemental authority filed by Appellee UPS and submitted to panel. Original and 3 copies. c/s: y (mt)

Docket Entries

11/28/97 [1088133] Errata sheet filed by Vaughn L. Murphy Original and 3 copies. c/s:y. (kjs)

12/15/97 [1092363] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y. (kjs)

12/15/97 [1092364] Supplemental authority submitted to panel. (kjs)

12/16/97 [1092724] Supplemental authority filed by Amicus Curiae Equal Employment. Original and 7 copies. c/s: y. (kjs)

12/16/97 [1092726] Supplemental authority submitted to panel. (kjs)

1/14/98 [1099212] Letter from appellant stating he has no objection to consolidation of appeal, filed by Appellant Vaughn L. Murphy. Original and 3 copies. c/s: y (lwb)

1/14/98 [1099219] Letter from appellee stating objection to consolidate appeals, filed by Appellee UPS. Original and 0 copies. c/s: y (lwb)

1/16/98 [1100700] Supplemental authority filed by Amicus Curiae Equal Employment and submitted to panel. Original and 9 copies. c/s: y (mt)

3/2/98 [1110978] Supplemental authority filed by Amicus Curiae Equal Employment Opportunity Commission and submitted to panel. Original and 7 copies. c/s: y (mt)

Docket Entries

3/11/98 [1113047] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Unpublished. Seymour; Anderson; Henry, authoring judge. (kjs)

4/2/98 [1119117] Mandate issued. Mandate receipt due 5/4/98 (kjs)

4/13/98 [1122057] Mandate receipt filed. (kjs)

5/26/98 [1132925] Case file closed. (drw)

6/15/98 [1139091] Petition for writ of certiorari filed on 6/9/98 by Appellant Vaughn L. Murphy. Supreme Court Number 97-1922. (kjs)

1/21/99 [1197431] Supreme Court order dated 1/8/99 granting certiorari filed. (kjs)

**AMERICANS WITH DISABILITIES ACT,
42 U.S.C. § 12101 *et seq.* (1990)**

* * *

GENERAL PROVISIONS

§ 12101. Findings and purposes

(a) Findings

The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

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(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

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(b) Purpose

It is the purpose of this chapter —

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes —

(A) qualified interpreters and other effective methods of making aurally delivered materials available to individuals with hearing impairments;

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(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual —

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

*Americans with Disabilities Act***TITLE I EMPLOYMENT****§ 12111. Definitions**

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health and safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

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(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include —

(i) the United States, corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the

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Controlled Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

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(9) Reasonable accommodation

The term "reasonable accommodation" may include —

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include —

(i) the nature and cost of the accommodation needed under this chapter;

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(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

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(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes —

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration —

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

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(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

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(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on —

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(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Pre-employment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions.

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(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if —

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that —

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

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(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113 Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to

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screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall —

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(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant

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risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol**(a) Qualified individual with a disability**

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who —

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or

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procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity —

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that —

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such

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regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

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(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to —

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title

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shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

§ 12116. Regulations

Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code [5 USCS §§ 551 et seq.].

§ 12117. Enforcement**(a) Powers, remedies, and procedures**

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the

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Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] not later than 18 months after July 26, 1990.

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ADA EEOC REGULATIONS, 29 C.F.R. § 1630.2 *et seq.* (1992)

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ADA TITLE I
EEOC REGULATIONS

* * *

§ 1630.2 Definitions.

* * *

(g) Disability means, with respect to an individual —

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; and

(3) being regarded as having such an impairment.

(See § 1630.3 for exceptions to this definition).

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or

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(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits —

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

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(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working —

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

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(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

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(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

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ADA TITLE I EEOC INTERPRETIVE GUIDANCE

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**ADA TITLE I
EEOC INTERPRETIVE GUIDANCE**

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Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA. The first of these is the term "disability." Congress adopted the definition of this term from the Rehabilitation Act definition of the term "individual with handicaps." By so doing, Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term "disability" as used in the ADA. Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

The definition of the term "disability" is divided into three parts. An individual must satisfy at least one of these parts in order to be considered an individual with a disability for purposes of this part. An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment. To understand the meaning of the term "disability," it is necessary to understand, as a preliminary matter, what is meant by the terms "physical or mental impairment," "major life activity," and "substantially limits." Each of these terms is discussed below.

*ADA Title I EEOC Interpretive Guidance*Section 1630.2(h)
Physical or Mental Impairment

This term adopts the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. It defines physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder.

The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. Similarly, the

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definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. See Senate Report at 22-23; House Labor Report at 51-52; House Judiciary Report at 28-29.

Section 1630-2(i) Major Life Activities

This term adopts the definition of the term "major life activities" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching. See Senate Report at 22; House Labor Report at 52; House Judiciary Report at 28.

Section 1630.2(j) Substantially Limits

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the

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individual's major life activities. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability.

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.

Other impairments, however, such as HIV infection, are inherently substantially limiting.

On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment. An impairment that prevents an individual from performing a major life activity substantially limits that major life activity. For example, an individual whose legs are paralyzed is substantially limited in the major life activity of walking because he or she is unable, due to the impairment, to perform that major life activity.

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under

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which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major life activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. See Senate Report at 23; House Labor Report at 52. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

Part 1630 notes several factors that should be considered in making the determination of whether an impairment is substantially limiting. These factors are (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment. The term "duration," as used in this context, refers to the length of time an impairment persists, while the term "impact" refers to the residual effects of an impairment. Thus, for example, a broken leg that takes eight weeks to heal is an impairment of fairly brief duration. However, if the broken leg heals improperly, the "impact" of the impairment would be the resulting permanent limp. Likewise, the effect on cognitive functions resulting from traumatic head injury would be the "impact" of that impairment.

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case

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basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors noted above, does not amount to a significant restriction when compared with the abilities of the average person. For example, an individual who had once been able to walk at an extraordinary speed would not be substantially limited in the major life activity of walking if, as a result of a physical impairment, he or she were only able to walk at an average speed, or even at moderately below average speed.

It is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments. Consequently, even if such factors substantially limit an individual's ability to perform a major life activity, this limitation will not constitute a disability. For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

If an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working. For example, if

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an individual is blind, i.e., substantially limited in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working. The determination of whether an individual is substantially limited in working must also be made on a case by case basis.

This part lists specific factors that may be used in making the determination of whether the limitation in working is "substantial." These factors are:

(1) The geographical area to which the individual has reasonable access;

(2) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(3) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment,

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but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs. See *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); *Jasany v. U.S. Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980).

On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. Similarly, suppose an individual has an allergy to a substance found in most high rise office buildings, but seldom found elsewhere, that makes breathing extremely difficult. Since this individual would be substantially limited in the ability to perform the broad range of jobs in various classes that are conducted in high rise

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office buildings within the geographical area to which he or she has reasonable access, he or she would be substantially limited in working.

The terms "number and types of jobs" and "number and types of other jobs," as used in the factors discussed above, are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g., "few," "many," "most") from which an individual would be excluded because of an impairment.

If an individual has a "mental or physical impairment" that "substantially limits" his or her ability to perform one or more "major life activities," that individual will satisfy the first part of the regulatory definition of "disability" and will be considered an individual with a disability. An individual who satisfies this first part of the definition of the term "disability" is not required to demonstrate that he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition.

* * *

Section 1630-2(l)

Regarded as Substantially Limited in a Major
Life Activity

If an individual cannot satisfy either the first part of the definition of "disability" or the second "record of" part of the definition, he or she may be able to satisfy the third part of the

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definition. The third part of the definition provides that an individual who is regarded by an employer or other covered entity as having an impairment that substantially limits a major life activity is an individual with a disability.

There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":

(1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;

(2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

(3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.

Senate Report at 23; House Labor Report at 53; House Judiciary Report at 29.

An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

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An individual satisfies the second part of the "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability. See Senate Report at 24; House Labor Report at 53; House Judiciary Report at 30-31.

An individual satisfies the third part of the "regarded as" definition of "disability" if the employer or other covered entity erroneously believes the individual has a substantially limiting impairment that the individual actually does not have. This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging this employee, is discriminating on the basis of disability.

The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court in the context of the Rehabilitation Act of 1973 in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). The Court noted that, although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. "Such an impairment might

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not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283. The Court concluded that by including "regarded as" in the Rehabilitation Act's definition, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

* * * *

TESTIMONY AND AFFIDAVIT OF VAUGHN MURPHY

TESTIMONY OF VAUGHN MURPHY

Murphy Depo.

Q. So there would be times during your shift where you would be the only mechanic on duty in Topeka?

A. That's correct.

Q. And so you would be the only one there at certain times to do these road tests on the trucks and the package cars; is that right?

A. That's correct.

(R. 105, ln. 14-20)

Q. So you mentioned that to Monica Sloan?

A. That's right.

Q. What did she tell you?

A. She said UPS requires 140 over 90.

Q. And this was before going back in and being rechecked?

A. That's correct.

(R. 106, ln. 8-13)

Q. What does it show that your blood pressure reading was?

Testimony and Affidavit of Vaughn Murphy

A. 160 over 102 and 164 over 104 on the other arm.

(R. 107, ln. 1-3)

Q. When you called Monica Sloan, was she in?

A. I believe so.

Q. As best you can remember, tell me what happened during that conversation. What was said?

A. I related these figures to her. And her reply to me was that I couldn't return to work until it was — I don't know what the proper word would be — resolved, until this matter had been resolved.

(R. 107, ln. 16-23)

A. I felt that it was slightly elevated, but, you know, everyone gets — my doctors always tell me, well, when you are next to the doctor, you get — they take that into consideration. It is slightly elevated, you know, that you are nervous and it is an important —

(R. 108, ln. 13-17)

Q. Well, you knew that the federal regulations, based upon looking at the regulations yourself, required 160 over 90; is that correct?

A. That's correct.

(R. 109, ln. 21-24)

Testimony and Affidavit of Vaughn Murphy

Q. Since 1977 or '78 when Dr. Knacksted first told you that your hypertension was a serious problem, do you recall any significant time period in there where your blood pressure was below 160 over 90 on a continuous basis?

A. Just for a short period. It was with some medication. It was just — the side effects were just too extreme.

Q. So other than that short period, your blood pressure has never, on a consistent basis, been below 160 over 90?

A. That's correct.

Q. And when it did get below that number, the side effects were too great to continue that type of medication?

A. That's correct.

(R. 110, ln. 1-16)

Q. After you were taken off work by Monica Sloan, is that when you requested the waiver?

A. That's correct.

Q. And you did that with Rudy Arzola?

A. That's correct.

Q. Can you nail down a date at all about when that happened?

Testimony and Affidavit of Vaughn Murphy

A. No, I cannot, not for sure, not the actual date.

Q. Within a few days?

A. It was within a few days of the 5th, somewhere in there. Not the 5th, but of Ms. Sloan's —

Q. Did you ever ask for a chance to get your blood pressure down?

A. Yes.

Q. Of who?

A. Of Rudy.

Q. What did he say?

(R. 115, ln. 9-25)

AFFIDAVIT OF VAUGHN MURPHY

2. I was never required to take a driving test or any other test with respect to driving as part of my employment application or orientation with UPS.
3. I have never been diagnosed as having cerebrovascular disease to my knowledge. My blood pressure was taken on August 16, 1994. The measurements did not begin after five minutes of rest. The cuff was not the appropriate size, it was too small. David Couch only took one reading, not two, to the best of my knowledge.

(R. 324, 325, Paragraphs 2, 3)

*Testimony and Affidavit of Vaughn Murphy***TESTIMONY OF VAUGHN MURPHY***Murphy Depo.*

A. Some of the medication tends to give me gout. It is a form of arthritis. It can be crippling. It can put you in bed for up to a week or 10 days, depending on where you get it and how severe you get it, how soon you start the remedy for it. Sometimes the remedy affects the blood pressure medication. Just like a cold, I have to be careful what I take over the counter versus my blood pressure medication. So, you know, it is a constant battle. Every day, you have to think about can I take this, can I eat that. It is a never ending thought of how you live. But you form a habit and that is how you work.

(R. 327, ln. 1-12)

Q. You had mentioned that with your jobs, the effect that hypertension has had on your jobs, that you don't lift heavy objects without either a lever or having somebody else help you, you don't run across the shop to answer the phone. What other ways has hypertension affected your ability to be able to perform a job, any of the jobs that you have held?

A. Well, I am not sure right now. I am kind of at a loss of an answer other than what we have spoke about.

(R. 327, ln. 13-21)

Testimony and Affidavit of Vaughn Murphy

Q. You had said that occasionally while you were working at Ryder and the company that they bought over that 19 years, that sometimes your medication would cause you to have side effects. You would be angry; you would get high tempered with people; is that correct?

A. That's correct.

Q. Other than that, did your hypertension ever cause you to be unable to do any other functions that you were required to do?

A. Some of the job duties that I performed, I did differently and was questioned of it sometimes because I found it easier to do some things the way that — I had tricks, if you want to call it that, shortcuts. Let's say a tire on a truck, some guys would just jerk

(R. 328, ln. 12-25)

it off and try to roll it across the floor. I would go get a two wheeled cart, slip under it and wheel it across the floor with a cart. I don't know if you would call that working smart or just the habit I had formed trying to save my knees and my body. If I bruised a knee, the gout would set in. So I tried to work with what I had to stay as competitive as I could.

Q. And with these tricks or shortcuts that you had adapted, you were able to perform the job without any real problems even though you had hypertension?

A. Basically.

(R. 329, ln. 1-12)

Testimony and Affidavit of Vaughn Murphy

Q. What did Mr. Arzola tell you was the reason your training was being terminated?

A. Because of my hypertension.

(R. 333, ln. 20-25)

Q. In order to get your blood pressure below 160 over 90, what would be required?

A. Probably some modification of my medication.

Q. What type of modification, if you know?

A. I don't know. I know when they changed them before, it was a gradual change and not just a sudden one to the other.

Q. Changing the medication or increasing the dosage of the medication to get it below the 160 over 90, would that cause any side effects?

A. It is unknown until we try it.

(R. 334, ln. 15-25)

Q. Since 1977 or '78 when Dr. Knacksted first told you that your hypertension was a serious problem, do you recall any significant time period in there where your blood pressure was below 160 over 90 on a continuous basis?

Testimony and Affidavit of Vaughn Murphy

A. Just for a short period. It was with some medication. It was just — the side effects were just too extreme.

Q. So other than that short period, your blood pressure has never, on a consistent basis, been below 160 over 90?

A. That's correct.

Q. And when it did get below that number, the side effects were too great to continue that type of medication?

A. That's correct.

(R. 335, ln. 1-16)

Q. After Mr. Arzola told you that you were being terminated or that your training was being terminated on October the 5th, did you continue the process of trying to obtain a waiver?

A. No, I did not.

(R. 335, ln. 21-25)

Q. If they would have given you 30 days, would you have been able to get it down below 160 over 90?

A. I would have tried desperately.

Q. Do you think you would have been able to?

Testimony and Affidavit of Vaughn Murphy

A. Without trying that, I don't know. There are new medications. And Dr. Doubek, who I had not seen too long, she might have had some better ideas. You know, I offered to do that for Rudy, and they said it's too late.

Q. The only time, however, that your blood pressure has been below 160 over 90, you have had bad side effects from the medication; is that right?

A. Below 140 over 90.

Q. I thought you told me earlier it was 160 over 90?

A. No. It usually averages 160 over 100, somewhere in there. Below 140 over 90 is when it started — side effects were problems.

(R. 336, ln. 9-25)

Q. You would be able to get it down below 160 over 90 without having side effects or you have done it in the past?

A. I would attempt to try to. If I had been allowed proper time and the chance to deal with my doctor and attempt it, I would have tried to.

Q. I thought you had told me earlier, though, that the only time you have ever been able to get it down below 160 over 90 was when you were on medication with Dr. Knacksted and had bad side effects?

Testimony and Affidavit of Vaughn Murphy

A. That was below 140, sir.

Q. So you believe you would be able to get it down below 160 over 90 without having bad side effects?

A. I think I can, yes.

(R. 337, ln. 1-14)

EXAMINATION BY MR. LOWRY:

Q. Vaughn, you have hypertension, correct?

A. That's correct.

Q. And you have had it since age eight or nine?

A. That is close, yes.

Q. As of August, September and October of 1994, how did that hypertension affect your activities of daily living?

A. Well, you had to watch how you did some things. You know, you didn't run for the phone, you didn't chase after cabs or buses. If I had to lift something heavy, I would get a bar. I watched my diet, drink plenty of fluids, be careful what you eat and drink.

Q. Did it affect how you exercised?

A. You can't exercise. You have to do that moderately.

(R. 338, ln. 11-25)

Walking is considered exercise for me.

Testimony and Affidavit of Vaughn Murphy

Q. Did you place any limits on yourself on walking or exercising?

A. Just as day to day how you felt to do it.

Q. Did your hypertension affect your ability to lift?

A. Yes.

Q. How?

A. You had to be careful about how and how heavy you lifted, how high, what position you had to lift with. If you had to lift something heavy, you looked for a lift or a lever or a cherry picker or help.

Q. Did it affect how long you could do certain things, like your endurance?

A. Yes.

Q. Your stamina?

A. Yes.

Q. How?

A. Short winded, you become short winded sometimes fairly easy if you had to carry something very far.

Q. Did it affect your diet?

A. Oh, yes.

Testimony and Affidavit of Vaughn Murphy

Q. How?

A. You have to watch what you eat, the fats, the salts. You know, some foods are — affect — some of the medications I get will give you gout. Some foods tend

(R. 339, ln. 1-25)

to bring that on sooner than others did.

Q. Did it affect your sight or your hearing?

A. If your blood pressure would go up, your ears would ring, make it hard to hear.

Q. Did it affect your sight at all?

A. It could make — you could see runners in your eyes occasionally if your blood pressure is up.

Q. What is a runner?

A. When you see like a bubble go across your eyeball, you know, something making a path.

Q. It just looks kind of like a flash of light or something?

A. Yeah, like a bug walked across or flew by you.

Q. What would you call very heavy work, what types of jobs?

Testimony and Affidavit of Vaughn Murphy

A. Oh, working on construction machinery, concrete maintenance repair type, bridge work, that would be heavy. Steel work, I am sure that would be heavy.

Q. Do you think you could do that kind of work?

A. No, I couldn't.

Q. Why not?

A. It would be out of my range of lifting.

Q. Because of your hypertension?

A. That's correct.

Q. What would you call heavy work?

(R. 340, ln. 1-25)

A. I would say construction, loading, unloading trucks, moving furniture.

Q. Do you think you are able to do that type of heavy work, that class of heavy work?

A. I wouldn't think so.

Q. How would you describe mechanic work?

A. It is a medium work.

Testimony and Affidavit of Vaughn Murphy

Q. Do you feel you are able to do medium work?

A. I have been able to perform that, yes.

(R. 341, ln. 1-9)

Q. What did you put down for Interrogatory No. 12; what was your answer?

A. "All mechanic duties including inspection, repair, preventative maintenance."

Q. Can you break that down a little bit more as to what

(R. 341, ln. 21-25)

the fundamental job duties of a mechanic are at UPS?

A. Probably change oil in trucks; lube them; tighten the nuts and bolts; make sure the mufflers are under them; the lights are running; make sure the horn honks; the doors lock; make sure they are safe so that they don't run over someone.

(R. 342, ln. 1-6)

Q. Did you have any other duties other than fixing trucks, inspecting them, doing preventative maintenance?

A. Not that I was told of. Well, maybe some record keeping.

Testimony and Affidavit of Vaughn Murphy

MR. HOLLAND: I am going to object to these answers, but I am going to object to the form of the question because he has already testified that there were other functions.

Q. (BY MR. LOWRY) Were you ever told that driving a truck was going to be part of the job duties of a mechanic?

A. Yes.

Q. By who?

A. By Rudy.

Q. Is driving a truck in your opinion one of the fundamental job duties, or is it a peripheral job duty of a mechanic?

MR. HOLLAND: Object to the question. It

(R. 342, ln. 7-25)

calls for a legal conclusion. You can answer it.

A. A fringe area.

(R. 343, ln. 1-3)

Q. How many times did you do that while you were at UPS over that month and a week time period or so?

Testimony and Affidavit of Vaughn Murphy

- A. I am not sure. Maybe a dozen or 18 times. It might be the same truck over the same block.

(R. 343, ln. 8-11)

- Q. You said that you are unable to run and you are unable to lift heavy objects; is that right?

A. That's correct.

(R. 344, ln. 2-4)

- A. I am just — I have been recommended by my doctor not to exert on heavy items.

- Q. Did your doctor ever define heavy item for you?

A. Basically if it feels like you are straining, don't lift it.

(R. 344, ln. 17-21)

- Q. And has your doctor ever given you a formal restriction to give to your employer to say don't let Vaughn lift over a certain amount?

A. No.

(R. 344, ln. 22-25)

**TESTIMONY AND REPORT OF DEBRA DOUBEK, M.D.
(MR. MURPHY'S PRIVATE PHYSICIAN)**

TESTIMONY OF DEBRA DOUBEK, M.D.

- Q. Should Vaughn Murphy have any restrictions against his activities or his work because of his high blood pressure?

A. I — if he wanted to work for a loading dock and lift 200 pounds of cargo, freight repetitively day in and day out, I would probably limit him from extreme situations like that.

(R. 150, ln. 18-24)

- Q. Okay, and based upon your examinations of Mr. Murphy, if you were to give him medication, either increase the dosage that he's already on or to give him another type of medication to get it below 160 over 90, isn't it true that Mr. Murphy would, in his own words, not be able to function to get it down that low?

A. Correct.

(R. 151, ln. 11-17)

- Q. What effect, if any, would Mr. Murphy's hypertension have on his every day life?

A. He functions normally doing everyday activity that an everyday person does.

- Q. And assuming that a blood pressure reading of 160 over 90 is required for the job that Mr. Murphy wanted,

Testimony and Report of Debra Doubek, M.D.

would Mr. Murphy ever be able to be qualified for that job?

A. With that assumption that you just gave, no.

(R. 152, ln. 2-9)

Q. When you said he's able to do everything that a normal person can do, you meant medicated? That Vaughn Murphy with his hypertension medicated?

A. Correct.

(R. 152, ln. 13-16)

Q. How would you characterize that uncontrolled blood pressure?

A. Very severe.

Q. And what are the effects of severe high blood pressure?

A. Severe high blood pressure can cause end organ damage, such as retinal hemorrhages, retinal damage, kidney damage, heart damage. We call those end organs.

Q. Did he have any evidence that you could tell of any end organ damage?

A. On September the 28th when he presented I didn't have enough information to make that judgment.

Testimony and Report of Debra Doubek, M.D.

Q. What would you need to do to determine that?

A. Blood work, a recent eye exam, an EKG, a chest x-ray, none of which were done.

(R. 346, ln. 1-15)

Q. What blood pressure are you trying to maintain with Vaughn Murphy?

A. Ideally I would like his blood pressure to be in the 140 over one — 140s over 80s range.

(R. 347, ln. 5-8)

Q. (BY MR. LOWRY) Yeah, Jim has referred us to May 16th, 1995, your note of that date, the second page of that. It's, normal for him runs 150 over 100, plus or minus five?

A. Correct.

Q. And then it says, when he's not on hypertensive medication his blood pressure runs 220 to 240 over 160 to 180

(R. 347, ln. 20-25)

Q. Hypertension is not normal, though, correct? If somebody has hypertension, they have something wrong with them?

A. It's considered to be a disease process, correct.

Testimony and Report of Debra Doubek, M.D.

Q. Okay, and it's a disease process of the cardiovascular system?

A. Of the blood vessels, correct.

Q. Should Vaughn Murphy have any restrictions against his activities or his work because of his work because of his high blood pressure?

A. I — if he wanted to work for a loading dock and lift 200 pounds of cargo, freight repetitively day in and day out, I would probably limit him from extreme situations like that.

Q. Okay, like for very heavy or heavy work?

(R. 348, ln. 11-25)

A. Correct.

(R. 349, ln. 1)

Q. How would you characterize the nature and severity of Vaughn Murphy's hypertension?

A. Mr. Murphy has very severe or stage four hypertension.

Q. And what's the diagnostic criteria for that?

A. According to the National Institute of Health, very severe or stage four hypertension is a systolic of greater than or equal to 210 millimeters of mercury, systolic greater than or equal to 120 millimeters of mercury

Testimony and Report of Debra Doubek, M.D.

diastolic, and according to his history, his untreated blood pressure fits

(R. 349, ln. 16-25)

that criteria.

Q. Okay, and that's untreated and not medicated?

A. Correct.

Q. Is his high blood pressure, hypertension permanent?

A. Yes.

Q. Would you restrict Vaughn Murphy's diet or the things that he eats?

A. Yes.

Q. What would be your restrictions on his diet?

A. He's overweight. He would ideally do best on a low fat, low cholesterol, low sodium, high fiber diet.

(R. 350, ln. 1-11)

Is Vaughn Murphy's hypertension likely to interfere with his ability to operate a commercial motor vehicle safely?

A. No.

(R. 351, ln. 10-13)

Testimony and Report of Debra Doubek, M.D.

Q. Okay. Would it be possible for Mr. Murphy to lower his blood pressure to below the 150 over 100 plus or minus five with medication or without? Is it possible for him to get it any lower than that?

A. It's in the realm of possibility. Many medications have been tried and if one did find a blood pressure medication that would do that, he said he can't function.

Q. Okay, so in order to, for Mr. Murphy's blood pressure to be 160 over 90 or below, he would have to be on such a high dosage of medication that he would not be able to function?

A. I can't say that's an accurate statement. I don't know about this high dosage of medication. Sometimes physicians use multiple, three or four regimens at lower doses, so, I don't agree with that statement necessarily.

Q. Okay. Would it be possible for Mr. Murphy to get his blood pressure reading below 160 over 90?

A. It's in the realm of possibility.

(R. 352, ln. 8-25)

*Testimony and Report of Debra Doubek, M.D.***REPORT OF DEBRA DOUBEK, M.D.**

September 29, 1994

Vernon Wenger, Transportation Manager
State Corporation Commission
1500 S.W. Arrowhead Rd.
Topeka, KS 66604-4027

RE: Vaughn Murphy

Dear Mr. Wenger,

Vaughn is a 43-year-old white male who just started on with your company on August 18, 1994. Mr. Murphy is a new patient to me today. I have taken care of his mother for several years. I am a board certified family physician in private practice in Manhattan Kansas. Mr. Murphy has come to my clinic today for a waiver of physical requirements. Mr. Murphy had some records with him today and I took a detailed history about his problems with hypertension. He has had problems with his blood pressure since the age of 9. He has been followed by multiple physicians for his blood pressure problems across the state including a Dr. Knackstedt in Phillipsburg Kansas where Mr. Murphy lived for 15 years. He has been followed by Dr. Yapel in Salina for 2 years and has seen a physician in Junction City since moving to this area. In addition he has seen cardiologist specialist Dr. Evans from Wichita on several occasions. His blood pressure regimen has remained unchanged for the last 2 years and he feels wonderful on this blood pressure regimen. He has tried approximately 9 other blood pressure medications all of which he had side effects to. He has had multiple testing for the cause of his high blood pressure

Testimony and Report of Debra Doubek, M.D.

including testing of his heart and kidneys and it is felt that he has essential hypertension, which is of undetermined etiology. Mr. Murphy's blood pressure does tend to run high but it has been felt by his physicians caring for him that his current blood pressure readings are ok for this individual. Many of the blood pressure medications that he has tried in the past have brought his blood pressure lower but he does not feel well when it is down to what we usually consider a normal reading of 120/80. When his blood pressure gets that low he cannot get out of bed and cannot function in a productive manner. His blood pressure in my office today is 166/100. He faithfully takes his 2 blood pressure medications which are Tenormin 50 mg daily and Zestril 10 mg daily. He recently passed his department of transportation physical administered on 8/15/94. I have performed a physical exam today which was normal. In summary, his blood pressure readings are elevated but I feel he is healthy to drive a truck for test purposes.

Respectfully,

Debra Doubek, M.D.

DD/dm

(R. 353/354 Doubek letter)

**TESTIMONY AND MEDICAL HISTORY FORM OF
DAVID COUCH (DOT EXAMINER)**

TESTIMONY OF DAVID COUCH

Q. So Vaughn Murphy has a permanent physiological disorder?

A. Yes, sir.

Q. And his physiological disorder is high blood pressure?

A. Yes, sir.

Q. Does that permanent high blood pressure cause him to be unable to perform daily activities that an average person could do?

A. I think we would have to specifically state what activities.

Q. Activities of daily living?

(R. 147, ln. 14-25)

A. No.

(R. 148, ln. 1)

Q. Is hypertension a physiological disorder?

A. Yes, sir.

Q. What system is it a part of?

Testimony and Medical History Form of David Couch

A. It's part of the cardiovascular system.

Q. Okay. And hypertension would be someone with blood pressure or hypertension is a blood pressure of over 140 over 90?

A. Persistent and prolonged elevation over 140 over 90.

Q. What does having a blood pressure of 140 over 90 or above consistently mean? What does — what is that in your system?

A. Basically, blood pressure is a measurement of the pressure of the blood through the pipes, if you will, the arteries. That's how it's measured. The problem is is that a person with long-standing high blood pressure can develop what's called end target damage or target organ damage, I

(R. 356, ln. 9-25)

should say. And specifically we look at the kidneys, look at the eyes, look at the heart and so on. People that have high blood pressure have a higher incidence of heart attacks, for example, have a higher incidence of renal problems, such as renal shutdown, kidney disease. People that have long-standing hypertension can have bleeds in the back of the eyes. So prolonged high blood pressure can damage other organs within the body.

Q. Is high blood pressure, in your opinion, a physical impairment?

Testimony and Medical History Form of David Couch

A. May have to explain to me what you mean by physical impairment.

Q. Is it a deviation from the norm?

A. Yes.

(R. 357, ln. 1-14)

Q. Okay. Now, after No. 24, it goes onto medical examiner's certificate, correct?

A. Yes.

Q. And you have filled that out?

A. I signed my name and license number.

Q. And read that part for me.

A. "I certify that I have examined Murphy Vaughn, II in accordance with Motor Carrier Safety Regulations and then 49 C.F.R. 391.41 through three 391.49 and with knowledge of the duties involved, I find this person qualified under the regulations.

Q. Okay. So on that date you qualified him, correct?

A. As the position of mechanic.

(R. 358, ln. 4-16)

Testimony and Medical History Form of David Couch

Q. Okay. What's your understanding of the position — of the duties of the position of mechanic?

A. That he would — he's a diesel engine mechanic, so he would repair the diesel engines and associated mechanical appurtenances of a truck.

Q. Okay. Have you been out to UPS?

A. No, sir.

(R. 358, ln. 17-23)

A. At the time I did Mr. Vaughn, he was the first mechanic I have done for UPS.

(R. 359, ln. 2-3)

A. Obesity and hypertension were the diagnosis.

Q. Lab data, No. 50?

A. He showed a little bit of protein of two plus in his urine dipstick.

Q. What does that mean?

A. That means he's got a little bit of protein in his urine which could be due to hypertension.

Q. Okay. Is that a significant problem?

A. Well, it could be an early indicator of some target organ damage.

Q. To the kidney?

Testimony and Medical History Form of David Couch

A. To the kidneys, yes, sir.

(R. 361, ln. 1-12)

Q. Okay. No. 56, medical recommendation. What was your recommendation?

(R. 361, ln. 24-25)

A. My recommendation was "Recommended without restriction or accommodation for mechanic position."

Q. All right. And certificate expiration date?

A. 8-16-96.

Q. It goes for two years?

A. Yes, sir.

(R. 362, ln. 1-6)

Q. Is his high blood pressure, in your opinion, under control with the medication?

A. No, sir.

Q. Okay. So if he — when you tested him, he was under two different blood pressure medications, correct?

A. Yes, sir.

Testimony and Medical History Form of David Couch

Q. And it's still high?

A. Yes, sir.

Q. What does that mean?

A. To me, that indicates that he's inadequately controlled and that was why he was asked to follow up with his primary care provider.

Q. Can Vaughn Murphy or — let's talk about restrictions. Would you give Vaughn Murphy any restrictions as to how far he could walk as opposed to the normal person?

A. What I would encourage him, if he was to get on a walking program, would be to start very slowly and then gradually increase. I would not give him any specific restrictions without further testing to see what his capacity would be.

Q. Would you recommend that he not run like the average person would?

A. Yes, sir.

Q. Why?

(R. 363, ln. 2-25)

A. Well, running, he would be a good candidate for the development of angina with his size and with his high blood pressure. And if he was to be involved in an exercise program, the first step would be walking and

Testimony and Medical History Form of David Couch

then over time if he lost weight and his cardiac abilities increased, then certainly he could move up to a running program, but not immediately.

Q. Are there any types of work — let me foundation it a little bit. You hand primarily workers in your practice?

A. Yes, sir.

Q. That's what occupational health means. You're dealing with workers and their injuries and health problems, correct?

A. Yes, sir.

Q. Would you restrict Vaughn Murphy from any types or classes of work because of his high blood pressure?

A. Possibly so, yes, sir.

Q. Possibly or probably?

A. Probably, depending on the type of work he's applying for.

Q. What types or classes of work would you recommend that he not do or have restrictions from?

A. I would restrict him from any type of work that requires a great deal of physical exertion and cardiac exertion.

(R. 364, ln. 1-25)

Testimony and Medical History Form of David Couch

Q. Like heavy work?

A. Yes.

Q. Are you familiar with the occupational categories of very heavy, heavy, medium?

A. Yes, sir.

Q. Is that something that you use in your practice?

A. It's in some cases we do.

Q. What classes of work, as far as being those types of designations, would you suggest that he not do?

A. Anything over medium.

Q. So that would be very heavy and heavy?

A. Right.

Q. So he should be restricted to a medium?

A. Or less.

Q. Or less?

A. Yes, sir.

Q. Does that restrict him out of a broad class of jobs?

Testimony and Medical History Form of David Couch

A. I would restrict him out of classes such as heavy construction work, steel workers, any type of job that again requires a great deal of physical activity or endurance.

Q. All right. And is it your job to give workers restrictions? Is that part of your work there at Occupational Health?

A. It may be.

(R. 365, ln. 1-25)

Q. Okay. How would you restrict him — or what conditions would you restrict him from?

A. I would restrict him from heavy physical exertion, lots of climbing, positions that would cause a significant cardiac work load.

Q. Would you place any specific restrictions on the manner of his activities?

A. Possibly, but I would — before putting objective findings, I would try to do a functional capacities evaluation on him and see what he can do or specifically match him to a specific job.

(R. 366, ln. 2-12)

Q. Would you restrict Vaughn Murphy in the duration or the length of time that he does any specific work activity?

Testimony and Medical History Form of David Couch

A. Again, it would depend again on the type of

(R. 366, ln. 23-25)

system?

(R. 367, ln. 1)

Q. (BY MR. LOWRY) Yes, as to duration of activities, condition of activities or manner of activities.

A. Generally speaking, again, anything with a heavy to very heavy work load, lots of repetitive climbing, lots of heavy physical work.

Q. How would you characterize the nature and severity of Vaughn Murphy's hypertension?

A. I would classify his high blood pressure as taken on this day as moderately severe.

Q. Under medication?

A. Under medication.

Q. Do you have any idea as to what his hypertension is without medication?

A. No, sir, I do not.

Q. If he had a high blood pressure of 250 over 160, how would you characterize that?

(R. 367, ln. 10-25)

Testimony and Medical History Form of David Couch

A. That would be severe and I would be looking at referral to a physician for possible hospitalization.

Q. A cardiologist?

A. Cardiologist or an internist.

Q. We've already talked about the duration and you said that you thought it appeared to be chronic and permanent?

A. Yes, sir.

Q. All right. What is the permanent or long-term probable impact of Vaughn Murphy's hypertension?

A. My concern would be that he would at some point have a problem with end target damage, could have a heart attack, heart failure, kidney failure, visual disturbances, et cetera, stroke.

Q. Could die?

A. Yes, sir.

(R. 368, ln. 1-16)

*Testimony and Medical History Form of David Couch***MEDICAL HISTORY FORM OF DAVID COUCH****MEDICAL HISTORY FORM**

Name: Vaughn L. Murphy, II

SS#: 482-60-7071

Date: 8/16/94

DOB: 12/20/50 Position: Mechanic

Personal Physician: Dr. Richard Yapple

Address: Claflin Ave., Salina, KS

STATEMENT OF EXAMINEE

The purpose of this STATEMENT OF EXAMINEE is to secure only that information which is necessary to allow for proper medical examination; the monitoring of occupational health; or as may be required by law as a condition of employment. Any deliberate false statement may be cause for disciplinary action up to and including discharge.

Every question must be answered. Date and sign consent statement when medical history form is complete.

1. Have you any condition that might require special accommodation or assistance to enable you to perform your job? No. If yes, describe.
2. Have you any condition that might put you, your co-workers, or any other persons at risk as you perform your job? No. If yes, describe.

Testimony and Medical History Form of David Couch

3. Have you ever received Workers' Compensation or disability compensation from the government, any employer, insurance company, or individual? No. If yes, when, for what condition, and for how long?
4. Have you ever had an occupational illness? No. If yes, describe condition and duration of recovery.
5. Have you ever had an occupational injury? Yes. If yes, describe condition and duration of recovery. Sprain knee, off work 3 days.
6. Have you ever had any exposure to chemicals, poisons, asbestos, or other hazardous materials, either at work, at home, or in other settings. No. If yes, give dates of exposure.

**TESTIMONY OF MONICA SLOAN
(UPS'S COMPANY NURSE)**

Q. Who did you talk to at MOHS?

A. Sherri.

(R. 168, ln. 24-25)

Q. Cherie Benwau (spelled phonetically), a nurse there?

A. Yes.

Q. What did you say and what did she say to the best of your recollection?

A. I asked if they had in fact given Vaughn a DOT card and she said yes and I said why? He didn't pass on the blood pressure readings and she said well, we didn't think he needed a DOT card. He's a mechanic and I said yes, he does need a DOT card and she said well, that was a mistake.

Q. Why does he need a DOT card to your understanding?

A. My understanding of the mechanic's job is that they have to road test vehicles as well as make road calls on broken-down vehicles and if you are driving a commercial vehicle, it is required of you to have a DOT card if that vehicle exceeds 10,001 pounds.

(R. 169, ln. 1-18)

A. I didn't fire Vaughn Murphy.

Testimony of Monica Sloan

Q. What did you do?

A. I simply told him that he did not meet the DOT regulation and that as part of his essential job functions, he must have a valid DOT card, and I know about the regulations because I'm responsible, or was responsible for approximately, probably 500 drivers and mechanics and we viewed DOT physicals virtually on a daily basis.

Q. Okay. You've reviewed the DOT regulations themselves?

A. Yes.

Q. And you are familiar with them?

A. Yes.

Q. Okay. What is the DOT requirement for blood pressure, to your understanding?

A. My understanding is it's 160 over 90.

(R. 170, ln. 7-23)

Q. (By Mr. Lowry) Nobody told you that Vaughn Murphy couldn't operate a, any motor vehicle safely, did they?

A. No one told me that he could not operate a motor vehicle safely.

(R. 172, ln. 10-14)

Testimony of Monica Sloan

Q. Do you interpret the federal regulations to require Vaughn Murphy to have a blood pressure under 160 over 90?

A. That was my understanding. That is the way I interpret it.

Q. That was my next question. Okay. And that still is your interpretation?

A. Yes, that is still my interpretation of the

(R. 172, ln. 18-25)

A. It is my belief and my understanding that that DOT card was issued in error. In my mind, it was not a valid DOT card.

(R. 174, ln. 11-13)

A. It was my understanding that his blood pressure exceeded 160 over 90 which was the minimum, well, maximum blood pressure that he could have. His blood pressure exceeded that. Therefore, I believed that the DOT card was issued in error and without a DOT card, he couldn't drive for us. Excuse me just a moment.

(R. 177, ln. 2-8)

Q. What blood pressure does Vaughn Murphy have to have to stay employed at UPS in your opinion?

A. 160 over 90.

Testimony of Monica Sloan

Q. What about the 140 over 80 or 90 number? Does he have to have blood pressure down that low?

A. No.

(R. 177, ln. 11-16)

Q. Let me hand you what's been marked as Couch Exhibit Number 6 and ask you to identify that.

A. That's the UPS medical examination form.

Q. Is that the form that you saw that caused you concern?

A. It is.

Q. And paragraph number 33, or question number 33 says BP, on page 2?

A. Correct.

Q. 186 over 124?

A. Correct.

(R. 179, ln. 4-14)

Q. Did you regard Vaughn Murphy as having an impairment, hypertension?

A. Again, I hadn't thought of blood pressure elevations in terms of impairment. I regarded him as not meeting the essential functions of the job.

Testimony of Monica Sloan

Q. And tell me what you mean by essential functions of the job.

A. That the person be DOT qualified.

(R. 180, ln. 11-18)

Q. Okay. Did you ever tell Vaughn Murphy that he had to have his blood pressure at or below 140 over 90?

A. No.

Q. So if he's testified that you told him that, that's not correct as far as you are concerned?

A. As far as I'm concerned, the blood pressure standard that we maintained at the time of Vaughn Murphy's examination would have been 160 over 90. UPS has a safety handbook that parallels the DOT regs that ideally all drivers' blood pressure is 140 over 90.

Q. Do you know if the 140 over 90 number was ever mentioned to Vaughn Murphy by you?

A. I'd have to say perhaps.

Q. But it's your testimony that you never told

(R. 385, ln. 11-25)

him that he had to have 140 over 90 to work for UPS?

A. I do not believe I said that.

Testimony of Monica Sloan

Q. Did you say anything close to that?

A. When reviewing the UPS DOT safety handbook, I may have said that to him while looking at the book.

Q. All right. Are you familiar with the DOT regs?

A. Somewhat.

Q. What training have you had, if any, in the DOT regs?

A. No specific training.

(R. 386, ln. 1-11)

Q. Okay. What is the DOT requirement for blood pressure, to your understanding?

A. My understanding is it's 160 over 90.

Q. Absolutely, no exceptions?

A. None that I'm familiar with.

(R. 387, ln. 21-25)

Q. . . . Can you identify that Exhibit 15, Doubek?

A. I don't know what you mean by identify.

Q. Can you identify it as a copy of the DOT regs?

Testimony of Monica Sloan

A. Oh, I see. Yes.

Q. It says Subpart E, Physical Qualifications and Examinations, correct?

A. Correct.

Q. Section 391.41, physical qualifications of drivers?

A. Right.

Q. Subsection B, "A person is physically qualified to drive a motor vehicle if that person," and then 1 through 13?

A. Correct.

Q. And number 6 says, "Has no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a motor vehicle safely."

A. Correct.

(R. 388, ln. 6-25)

Q. So a person could have high blood pressure then. Is that accurate?

A. Controlled high blood pressure.

Q. What's that mean?

A. Well, there's an additional section that further identifies what high blood pressure is that applies to this standard.

Testimony of Monica Sloan

Q. And what section is that? Do you know?

A. Well, I can't tell you the subpart numbers. Looks like section 391.43 under blood pressure.

Q. Okay. Are you talking about page 137 of Exhibit 15?

A. Correct.

Q. There's not 137 pages but the page that's numbered 137?

A. That's correct.

Q. Okay. What does it say under blood pressure?

A. "Record with either spring or mercury column type of sphygmomanometer. If the blood pressure is consistently above 160 over 90 millimeter mercury, further tests may be necessary to determine whether the driver is qualified to operate a motor vehicle."

Q. Okay. Neither of those sections that you've looked at says that a person absolutely has to have 160 over 90, does it?

(R. 389, ln. 1-25)

A. My understanding of the safety regulations as set out by the federal motor carriers is that physical qualifications and the physical examination given to a driver or mechanic would be minimum standards and the federal motor carriers have identified 160 over 90 as the minimum standard for blood pressure.

Testimony of Monica Sloan

Q. But neither of those sections that you've read says that it absolutely has to be under 160 over 90 in order to pass the physical, does it?

A. I don't agree with that.

(R. 390, ln. 1-10)

Q. (By Mr. Lowry) Nobody told you that Vaughn Murphy couldn't operate a, any motor vehicle safely, did they?

A. No one told me that he could not operate a motor vehicle safely.

Q. Okay. And Vaughn Murphy had a health card, didn't he?

A. Yes, he did.

Q. Do you interpret the federal regulations to require Vaughn Murphy to have a blood pressure under 160 over 90?

A. That was my understanding. That is the way I interpret it.

(R. 392, ln. 10-22)

Q. Did you ever perform a physical on Vaughn Murphy?

A. No.

Q. Did you ever take his blood pressure?

Testimony of Monica Sloan

A. No.

(R. 393, ln. 2-6)

Q. During this time, did you ever talk with

(R. 393, ln. 25)

David Couch?

A. I had a conversation with him but I don't know exactly what it was. He called me but I don't remember if it was like the 15th or when in this time frame we talked so, yes, the answer to your question is yes, I did talk with Dave Couch. I don't remember exactly when.

Q. What do you remember saying to him?

A. I asked him why he issued a DOT card in view of the fact that his, Vaughn's blood pressure exceeded the DOT regulations and UPS regulations and his understanding was that he did not need a DOT card as a mechanic.

Q. Did you tell him that the UPS regulation was 140 over 90?

A. I have a problem with that because I don't think that's correct.

Q. Why not?

A. Because I actually think it's 140 over 80.

Testimony of Monica Sloan

Q. Okay.

A. Okay, and I have not looked at that safety manual so I'm real uncomfortable saying that I told him that.

Q. Okay. Did you tell him either 140 over 90 or 140 over 80?

(R. 394, ln. 1-25)

A. Yes.

Q. And if that's what UPS required — and that's a yes?

A. Yes. I'm sorry.

Q. Sure. Did you ever make a determination as to whether it was safe for Vaughn Murphy to operate a motor vehicle safely?

A. No.

Q. Did you ever make a determination as to whether further tests should be done to determine whether he could operate a motor vehicle safely?

A. No.

Q. The only thing you saw was blood pressure in excess of 160 over 90 and said he can't work? Is that accurate?

A. He can't work without a DOT card so that

(R. 395, ln. 1-16)

**AFFIDAVIT OF RUDY ARZOLA (MR. MURPHY'S
DIRECT SUPERVISOR)**

**AFFIDAVIT OF RUDY ARZOLA IN SUPPORT OF
DEFENDANT'S SUMMARY JUDGMENT MOTION**

Rudy Arzola, being first duly sworn, states as follows:

1. I am an Automotive Supervisor for United Parcel Service. My office is in Lenexa, Kansas.
2. I am familiar with the regulations promulgated by the United States Department of Transportation and their definition of a "commercial motor vehicle."
3. Under DOT regulations, any vehicle with a gross weight rating of 10,001 or more pounds is considered a "commercial motor vehicle."
4. UPS package cars have a gross weight rating of 12,000 to 20,000 pounds. UPS tractor trailers have a gross weight rating of 55,000 pounds.
5. As part of his job duties as a mechanic for UPS, Vaughn Murphy was expected to be able to drive both package cars and tractor trailers to perform "road tests" and "road calls" and such driving was considered to be an essential function of his job.
6. A "road test" is when a mechanic takes the vehicle he is working on out on the road to diagnose the problem or determine if the previously diagnosed problem has been fixed. A "road call" is when a mechanic delivers an operating vehicle to a driver whose vehicle has broken down, fixes the broken vehicle, and drives it

Affidavit of Rudy Arzola

back to the facility. Sometimes there will be packages on board this vehicle the mechanic is driving and these packages are traveling in interstate commerce.

7. Working on the night shift in Topeka, Murphy would primarily be performing road calls on tractor trailers and road tests on package cars.
8. All of the vehicles which Murphy worked on were "commercial motor vehicle."

(Record 79-80)

**AFFIDAVIT AND TESTIMONY OF JOHN R. MCMAHON
(UPS'S HUMAN RESOURCES MANAGER)****AFFIDAVIT OF JOHN R. McMAHON IN SUPPORT OF
DEFENDANT'S SUMMARY JUDGMENT MOTION**

John R. McMahon, being first duly sworn, states as follows:

1. I am the Manager of Human Resources for United Parcel Service, Inc.'s, Kansas District which encompasses the entire state of Kansas. My office is in Lenexa, Kansas.
2. Attached to this affidavit as Exhibit No. 1 is a true and correct copy of the Medical Regulatory Criteria for Evaluation Under Section 391.41(b)(6), revised September 1988, which addresses the question under Section 391.41(b)(6) of whether an individual has a current clinical diagnosis of high blood pressure that is likely to interfere with his or her ability to operate a motor vehicle and when further tests may be necessary.

(Record 82-83)

*Affidavit and Testimony of John R. McMahon***MEDICAL REGULATORY CRITERIA FOR EVALUATION UNDER SECTION 391.41(B)(6)**

*** Whether an individual has a current clinical diagnosis of high blood pressure likely to interfere with a driver's ability to operate a motor vehicle.

Hypertension alone is unlikely to cause sudden collapse; however, the likelihood increases when target organ damage, particularly cerebral vascular disease, is present. Most commercial drivers with hypertension are not immediately unqualified to operate a commercial motor vehicle in interstate commerce. This regulatory criteria is based on the OMC's Cardiac Conference recommendations, which used the report of the 1984 Joint National Committee on Detection, Evaluation, and Treatment of High Blood Pressure as its starting point.

Mild Hypertension:

Initial blood pressure of 161-180 systolic and/or 91-104 diastolic is considered mild hypertension, and the driver need not be found unqualified during evaluation and institution of treatment.

1. The driver is given one 3-month period to reduce his or her blood pressure to less than or equal to 160/90; the certifying physician should state on the medical certificate that it is only valid for that one 3-month period.
2. If at any time during or by the end of this 3-month period the driver is found qualified with a blood pressure less than or equal to 160/90, the certifying physician may issue a medical certificate for a 1-year period but must confirm

Affidavit and Testimony of John R. McMahon

blood pressure control in the third month of this 1-year period.

3. The individual should be certified annually thereafter. The expiration date must be stated on the medical certificate.

Moderate to Severe Hypertension:

Initial blood pressure of greater than 180 systolic and/or greater than 104 diastolic is considered moderate to severe. *The driver may not be qualified, even temporarily*, until his or her blood pressure has been reduced to less than 181/105. Once the individual's blood pressure is below 181 and/or 105, the examining physician may temporarily certify the individual for one 3-month period as for mild hypertension:

1. The driver is given one 3-month period to reduce his or her blood pressure to less than or equal to 160/90; the certifying physician should state on the medical certificate that it is only valid for that 3-month period.
2. If at any time during or by the end of this 3-month period the driver is found qualified with a blood pressure less than or equal to 160/90, the certifying physician may issue a medical certificate for a 6-month period but must confirm blood pressure control in the third month.
3. For initial blood pressure greater than 180 and/or 104, documentation of continued control and recertification should be made every 6 months. The expiration date must be stated on the medical certificate.

The initial blood pressure finding should be confirmed by at least two subsequent measurements on different days. Blood

Affidavit and Testimony of John R. McMahon

pressure measurement should be made with the subject seated comfortably and relaxed. Systolic and diastolic pressures should be recorded, with the diastolic pressure reported as the disappearance of sound (phase V). Upper arm constriction by a rolled sleeve should be avoided. Large-sized arm cuffs should be available for use in subjects whose arm girth is larger than normal.

Evaluation of the hypertensive commercial driver should consist of a search for additional risk factors and evidence of target organ damage. Inquiry should be made regarding smoking, cardiovascular disease in relatives, and immoderate use of alcohol. An electrocardiogram (ECG) and blood profile, including glucose, cholesterol, HDL cholesterol, creatinine and potassium, should be made. An echocardiogram and chest x-ray are desirable in subjects with moderate or severe hypertension.

Since the presence of target organ damage increases the risk of sudden collapse, group 3 or 4 hypertensive retinopathy, left ventricular hypertrophy not otherwise explained (echocardiography or ECG by Estes criteria), evidence of severely reduced left ventricular function, or serum creatinine of greater than 2.5 warrants the driver being found unqualified to operate commercial motor vehicle in interstate commerce.

Treatment includes nonpharmacologic and pharmacologic modalities as outlined by the Joint National Committee, as well as counseling to reduce other risk factors. Most antihypertensive medications also have side effects, the importance of which must be judged on an individual basis. Side effects of somnolence or syncope are particularly undesirable in commercial drivers. Commercial drivers should be informed

Affidavit and Testimony of John R. McMahon

of the side effects of drug therapy and the interaction of their drugs with other prescription drugs, nonprescription drugs, and alcohol.

Surgically Corrected Hypertension:

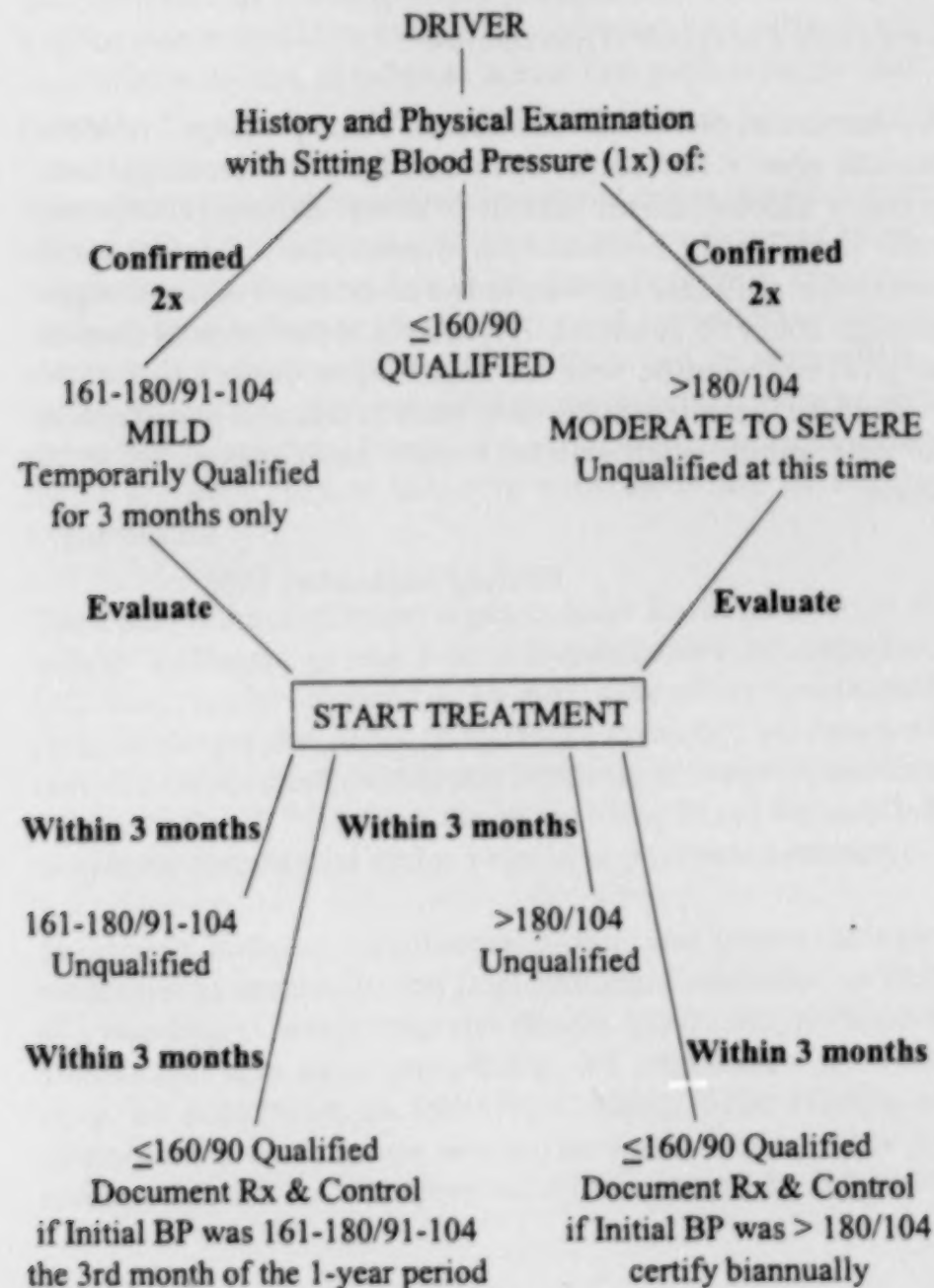
A commercial driver who has normal blood pressure 3 or more months after a successful operation for pheochromocytoma, primary aldosteronism (unless bilateral adrenalectomy has been performed), renovascular disease, or unilateral renal parenchymal disease and who shows no evidence of target organ damage could be qualified. Hypertension that persists despite surgical intervention with no target organ disease should be evaluated and treated on the same basis as essential hypertension for determining qualification. Follow guidelines as set forth above.

Revised September 1988

Affidavit and Testimony of John R. McMahon

HYPERTENSION CHART

HYPERTENSION



Affidavit and Testimony of John R. McMahon

TESTIMONY OF JOHN R. McMAHON

(Record 85-88)

Q. What information did you have when you made your decision to fire him?

A. The medical information provided to me by Monica.

Q. Anything else?

A. No.

Q. Did you have his personnel file?

A. I may have but I don't remember.

Q. What's the reason why he was fired?

A. The reason was that Mr. Murphy did not meet the requirements of the Department of Transportation.

Q. What requirements of the Department of Transportation did he fail to meet in your opinion?

A. He could not meet the requirement of the blood pressure requirement, minimal acceptable requirement.

Q. What's that?

A. I believe it's 160 over 90.

Affidavit and Testimony of John R. McMahon

Q. And what are you relying on to, what did you rely on as information that Vaughn couldn't or didn't meet the DOT requirements?

(R. 158, ln. 5-25)

A. The information provided by the people with the medical expertise that determined whether he could or couldn't.

(R. 159, ln. 1-3)

Q. What I'm trying to find out is did Monica Sloan tell you that he didn't meet DOT requirements, did the forms tell you that, because the record is that Vaughn had a DOT health card, correct? Did you know that?

A. I know he had a card. I know it wasn't valid.

Q. How do you know it wasn't valid?

A. Because he didn't meet the DOT requirements.

(R. 159, ln. 6-14)

Q. Did you consider Vaughn Murphy as disabled because of his high blood pressure?

A. Well, let me ask you, when you are saying disabled, disabled in what way? Disabled as unable to —

Q. This is a question as to, as unable to drive a truck.

Affidavit and Testimony of John R. McMahon

A. I considered him not to be acceptable based on the requirement of the Department of Transportation.

Q. Did you consider him to be disabled and unable to drive a truck because of his high blood pressure? Yes or no.

A. If it was his own truck, no.

Q. What if it was UPS's truck?

A. Then yes, I did consider him to be not acceptable to operate the vehicle for us.

Q. Because of his high blood pressure?

A. That's correct.

(R. 160, ln. 4-21)

**TESTIMONY OF ROBERT BROWN, M.D. (UPS'S
DESIGNATED PHYSICIAN EXPERT)**

Q. Have you ever to the best of your recollection denied someone a DOT medical card for high blood pressure before?

A. Yes.

Q. Do you do DOT physicals for UPS?

A. Yes.

(R. 133, ln. 1-6)

A. He went and after having a conditional offer of employment from UPS went to have a DOT examination on 8-16-94 by David Couch and in the course of that examination had a blood pressure of 186 over 124 which would by DOT guidelines make him unqualified until his blood pressure was brought down. And he was incorrectly given a DOT card at that time. The physical was later reviewed by Monica Sloan. The problem with the blood pressure was found and he went back, had another physical, I believe, and ended up failing. In any case, ended up failing. And consequently, although he had been working for some time, he was found DOT unqualified and was not working until he was DOT qualified which I guess is never.

Q. What's your understanding of the proper procedure for qualifying someone under the DOT for drivers?

A. With regard to blood pressure.

Testimony of Robert Brown, M.D.

Q. Yes.

A. The blood pressure when it's initially taken, if it is less than or equal to 160 over 90, then they pass. If it is between 161 — greater than 160 over 90 but less than 181 over 105, then it is up to the doctor's discretion as to whether or not they'd be qualified for a period of three months. And after — or if they are in excess of 180 over 104, then they are not qualified until their blood pressure is below 161 — well, less than or equal to 160 over 90.

(R. 134, ln. 1-25)

Q. Were DOT regulations followed in the examination and testing of Vaughn Murphy's blood pressure in your opinion?

A. No.

Q. Why not?

A. Because he should have been disqualified on his initial exam and not qualified until his blood pressure was less than or equal to 160 over 90.

(R. 135, ln. 1-8)

Q. Okay. By physical impairment, I mean a physiological disorder or condition affecting one of the major systems of the body, like the cardiovascular system?

A. I would say that it is.

Testimony of Robert Brown, M.D.

Q. Does his high blood pressure significantly restrict him as to the condition, manner or duration in which he can perform major life activities or activities of daily living as compared to the average person?

A. Not yet.

(R. 136, ln. 1-9)

Q. Can he walk like the average person could without high blood pressure?

(R. 136, ln. 20-21)

A. Yeah, I think so.

(R. 136, ln. 25)

Q. (BY MR. LOWRY) Can he lift the same as what an average person could?

A. I don't know what the number would be for an average person. I suspect if you actually take everybody and average them, he probably can lift better than them because he's a big guy. You know, I'm not sure how to answer that. I certainly would have some concerns about him doing that.

Q. Does his high blood pressure restrict him in work?

A. Only with regard to DOT certification.

(R. 137, ln. 1-9)

Testimony of Robert Brown, M.D.

Q. What is the DOT physical qualification for drivers for blood pressure?

A. They are supposed to be less than or equal to 160 over 90.

Q. Is that number absolute?

A. No. They can be certified one time for a period of three months if their initial blood pressure is in excess of 160 over 90 but less than 181 over 105.

(R. 139, ln. 17-24)

Q. And if Vaughn — the regulation says if he had blood pressure under 180 over 104?

A. Initially.

Q. Initially, then he gets a temporary card?

A. No. It says he can get a temporary card. It's up to the physician's discretion on that.

Q. Would you have given him a three-month card?

A. If I had his records, I would not.

Q. Why not?

A. Because he hasn't been able to maintain it below that. It has to be reasonable that he will attain it. Unfortunately, his history shows that that's not the case.

Testimony of Robert Brown, M.D.

Q. It's been below 180 over 104?

A. That's not the point. After three months, you have to be below 160 over 90 — equal to or below 160 over 90 and that's not something he's been able to do. So for that reason I wouldn't have given it to him if I knew all this information. If he came in, I would ask him about his hypertension, and if he told me that he was unable to keep his blood pressure in that range because of side effects, then I would not have given it to him.

(R. 144, ln. 1-21)

Q. Paragraph No. 2 under hypertension says if at any time during or by the end of this three-month period, the BP, blood pressure, is found to be less than or equal to 160 over 90 a medical certificate may be issued for a one-year period, correct?

A. That's correct.

Q. So if he hits 160 over 90 one time, he can get — he can keep that three-month card, correct?

A. Yeah. He would be eligible for getting a three-month card. If it looked like that's something that could be done and if he succeeded in doing it, he could get a one-year card.

Q. Right. It goes on to say it must be confirmed in the third month of the one-year period?

A. That's correct.

Testimony of Robert Brown, M.D.

Q. So he'd have to go back again and he's to have it 160 or 90?

A. That's what's supposed to happen.

Q. That didn't happen with Vaughn Murphy?

A. Not very much, correct, happened with Vaughn Murphy. He first off shouldn't have been certified in the first place and secondly shouldn't have an opportunity for a three-month card — or shouldn't have an opportunity to be certified until his blood pressure was less than or equal to 160 over 90.

(R. 145, ln. 1-25)

A. Not very much, correct, happened with Vaughn Murphy. He first off shouldn't have been certified in the first place and secondly shouldn't have an opportunity for a three-month card — or shouldn't have an opportunity to be certified until his blood pressure was less than or equal to 160 over 90.

(R. 145, ln. 20-25)

**TESTIMONY AND REPORT OF LEWIS VIERLING
(UPS'S DESIGNATED VOCATIONAL EXPERT)**

TESTIMONY OF LEWIS VIERLING

Q. Does Vaughn Murphy's high blood pressure limit his ability to work or obtain jobs in the open labor market in your opinion?

A. Generally speaking, no.

Q. Why not?

A. Because it's a fairly common medical condition and as such, if normally treated by medication, doesn't interfere with the person's ability to function, work or function.

(R. 183, ln. 6-14)

Q. All right. Now, if they have put or recommended restrictions on Vaughn Murphy, wouldn't that restrict his ability to get jobs in the open labor market?

A. I would really have to see what those restrictions are before I could answer that.

Q. For example, say he's restricted out of very heavy work, would that restrict him out of a broad class of jobs?

A. No.

Q. Why not?

Testimony and Report of Lewis Vierling

A. Because very heavy work is not a broad, there are not a large number of people doing very heavy work. It's a very small category.

Q. How many people are doing very heavy work?

A. I can't tell you that, but I can tell you that statistically, very heavy work is a very small part of the overall pie.

(R. 184, ln. 4-21)

*Testimony and Report of Lewis Vierling***REPORT OF LEWIS VIERLING**

VOCATIONAL EVALUATION — Vaughn L. Murphy, II — by Lewis E. Vierling, MS, CHCM, CRC, CCM, Vice President/Rehabilitation Consultant")

(R. 185)

WORK PROFILE

From a total of 2,500 of the most prevalent jobs, those in which 93% of all workers are employed, a work profile was obtained. The total number of jobs in the profile was arrived at by using Mr. Murphy's work history as previously identified and enumerated in this report. The second category is for closely-related occupations which includes, as its base of comparison, all 12,741 occupations listed in the *Dictionary of Occupational Titles*.

Realistic Alternatives — The Work Profile includes 742 occupations in which Mr. Murphy could enter with some re-training.

Closely-Related — The Work Profile includes 8,144 occupations in which Mr. Murphy could enter with little or no training.

Transferable Skills Analysis

This consultant performed a Transferable Skills Analysis (TSA) based upon Mr. Murphy's education, work history, and accumulated worker traits. These worker traits included the previously identified worker functions as well as temperaments

Testimony and Report of Lewis Vierling

and stress-related demands. As noted above, two analysis were performed, one involving a search for Realistic Alternatives and the other for Closely-Related occupations. In addition, the alternatives identified are scored based upon a "goodness-of-fit concept." A score is computed for each occupation indicating how closely the occupations match the profile of the client. Ten high-scoring occupations out of a total of 60 scored in both groups are as follows:

DOT #620.281-050, *Mechanic-Industrial Truck*

DOT #625.281-010, *Diesel Mechanic*

DOT #626.381-014, *Gas-Welding-Equipment Mechanic*

DOT #620.281-010, *Automotive-Mechanic-Equipment Service*

DOT #625.281-026, *Gas-Engine Repairer*

The following are examples of Closely-Related occupations:

DOT #183.167-030, *Service Supervisor-Leased Machinery*

DOT #609.462.010, *Balancing-Machine Operator*

DOT #638.261-030, *Machine Repairer, Maintenance*

DOT #625.281.022, *Fuel-Engine Servicer*

DOT #625.281.034, *Small-Engine Mechanic*

*Testimony and Report of Lewis Vierling**LABOR MARKET INFORMATION**Wage/Salary Information:*

The following information is being provided as wage/salary estimates for employment in Mr. Murphy's usual and customary work:

Estimated Median Wage

DOT #620.281-050,		
Mechanic —	starting salary	\$21,159
	3 years of experience	\$24,456
	6 years of experience	\$27,890

DOT #625.281-010,		
Diesel Mechanic —	starting salary	\$19,655
	6 years of experience	\$25,252
	12 years of experience	\$29,084

SUMMARY/OPINIONS

Mr. Murphy has demonstrated through his specialized training, education and experience that he is capable of earning \$25,000 per year or \$12.00 per hour. His usual and customary work is in the area of mechanic and diesel engine repairer. While this is a highly specialized area, there is on-going demand for individuals with this type of training and experience.

(189-191, Vierling Report)

TESTIMONY OF ROBERT KING (UPS EMPLOYEE)

Q. Why do mechanics have to have health cards?

A. Because mechanics have to, as I said, go on breakdowns and there are occasions when packages are on the vehicles and we will be driving them and filing packages as interstate commerce, that type of thing.

(R. 155, ln. 8-12)

ESSENTIAL JOB FUNCTIONS — AUTOMOTIVE MECHANIC

Essential Job Functions Automotive Mechanic

Overview:

Works with various tool to repair vehicles and machinery. Must meet D.O.T. Requirements and be CDL qualified as required by job assignment.

Essential Functions: must be able to:

- Bend, stoop, squat, kneel, crawl, climb ladders and stairs, stand, walk and turn/pivot frequently throughout the duration of the workday
 - Part time - 3-5 hours per day, 5 days per week
 - Full-time - 8-9 hours per day, 5 days per week
- Sitting required infrequently throughout the duration of the workday
- Lift, lower, push, pull and carry equipment and/or parts up to and possibly greater than 70 pounds to assigned work area
- Simple hand grasping, power hand grasping, fine hand manipulation, reaching foot to shoulder and above necessary to complete assigned tasks
- Operate standard transmission
- To work in an environment that will contain:
 - variable temperatures and humidity (climatic conditions)
 - exposure to cleaning materials, petroleum, products, dust, dirt, and noise
 - outside inclement weather

Essential Job Functions

- Demonstrate cognitive ability to:
 - follow directions and routines
 - work independently with appropriate judgment
 - illustrate spatial awareness
 - read, write and comprehend numbers and decimal number systems
 - concentrate, memorize, and recollect
 - identify logical connections and determine sequence of response
 - processing up to 2-3 steps ahead
- Operate power, pneumatic hand tools
- Other functions that may be assigned

The essential functions of this position include, but may not be limited to those listed above. UPS retains the discretion to modify the duties of the position at any time.

FINAL PRETRIAL ORDER DATED SEPTEMBER 5, 1996***Final Pretrial Order***

(Record 14)

5. Stipulations

- a. At all material times, Plaintiff's blood pressure was above 160/90.
- b. Meeting DOT requirements is listed as essential function of the job.

(Record 21)

IT IS SO ORDERED, and this Pretrial Order shall supersede pleadings and control the future course of the action unless modified to prevent manifest injustice.

Dated at Topeka, Kansas, this 5th day of September, 1996.

/s/ Sam Crow
UNITED STATES DISTRICT JUDGE

(Record 24)

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT****I. INTRODUCTION**

This lawsuit under the Americans With Disabilities Act ("ADA") arises out of plaintiff's termination of employment with defendant United Parcel Service, Inc. ("UPS"). Plaintiff was employed as a mechanic for five weeks. He was terminated after UPS learned that his blood pressure exceeded the physical qualification standard established by the United States Department of Transportation for persons who drive commercial motor vehicles.

The grounds for this motion are: (1) plaintiff does not have a "disability" as defined by the ADA because the uncontroverted evidence establishes that plaintiff's high blood pressure ("hypertension") does not substantially limit any major life activity; and (2) even if one assumes plaintiff's hypertension is a disability, he is not a "qualified individual with a disability" under the ADA because the uncontroverted evidence establishes the following:

- A. Driving commercial motor vehicles is an essential job function of plaintiff's position as a mechanic for UPS.
- B. DOT regulations require an employee who drives a commercial motor vehicle to be "physically qualified."
- C. In order to be "physically qualified" under DOT regulations, the employee must be able to maintain a blood pressure of 160/90 or below.
- D. Plaintiff's blood pressure has been above 160/90 at all material times.

Defendant's Memorandum

- E. Plaintiff demanded accommodation that UPS allow him to work while he tried to get a "waiver" of the DOT standard and tried to get his blood pressure down to meet the DOT standard is not reasonable accommodation under the ADA.

II. LOCAL RULE 56.1 STATEMENT OF UNCONTESTED MATERIAL FACTS

A. Uncontroverted Facts Establishing Plaintiff Does Not Have a "Disability" Under the ADA.

1. Plaintiff has had high blood pressure ("hypertension") since he was 10 years old. (Murphy Dep., p. 7)
2. Plaintiff has never had a doctor place any work restrictions on him because of his hypertension. (Murphy Dep., p. 169)
3. For over 22 years, plaintiff has performed mechanic jobs that did not require DOT certification without any limitation resulting from his hypertension other than the self-imposed restriction of using a lever to lift heavy objects and not running to answer the telephone. (Murphy Dep., pp. 30-33)
4. Plaintiff's hypertension has not had any effect on his non-work activities other than not being able to mow the yard with a push mower and not playing activity sports such as baseball and basketball. (Murphy Dep., p. 20-22)
5. Plaintiff's treating doctor, Dr. Debra Doubek, testified that plaintiff "functions normally doing everyday

Defendant's Memorandum

- activity that an everyday person does." (Doubek Dep., p. 29)
6. Plaintiff's hypertension does not have any effect on his everyday activity. (Doubek Dep., p. 29)
 7. The only limitation Dr. Doubek may place on plaintiff is that he not hold a job requiring repetitive lifting of 200 pounds. (Doubek Dep., p. 13)
 8. UPS's expert medical witness, Dr. Robert R. Brown, testified that plaintiff's hypertension does not significantly restrict him as to the condition, manner, or duration in which he can perform major life activities or activities of daily living as compared to the average person. (Brown Dep., p. 29)
 9. Brown testified that plaintiff should only be restricted from very heavy lifting on a very frequent basis. (Brown Dep., p. 31)
 10. UPS's vocational rehabilitation expert, Lewis Vierling, testified that plaintiff's high blood pressure does not limit his ability to work or obtain jobs in the open labor market. (Vierling Dep., p. 28)
 11. David Couch, the nurse who performed the DOT physical on plaintiff, testified that plaintiff's hypertension does not effect his activities of daily living. (Couch Dep., p. 37)

*Defendant's Memorandum***B. Uncontroverted Facts Establishing Plaintiff is Not a "Qualified Individual with a Disability" Under the ADA.**

12. In early August 1994, plaintiff applied for a position as a mechanic at UPS. (Murphy Dep., p. 41)
13. Plaintiff knew that driving would be part of his job duties as a UPS mechanic. (Murphy Dep., p. 87, 163)
14. When plaintiff filled out his application for employment at UPS, in addition to knowing that driving would be a required part of his job, he also knew that a condition of his employment would be taking and passing a DOT physical and obtaining a DOT health card. (Murphy Dep., p. 55)
15. Plaintiff was hired by UPS as a mechanic at the Topeka facility and began working on August 18, 1994. (Murphy Dep., pp. 85-86)
16. The UPS job description for mechanic states that the essential functions include a commercial driver's license, meeting DOT regulations, and operating a standard transmission. (See Stipulation in Pretrial Order; King Dep., p. 10; Sloan Dep., p. 55)
17. DOT regulations define a "commercial motor vehicle" as follows:

... any self-propelled or towed motor vehicle used on public highways in interstate commerce to transport passengers

Defendant's Memorandum

or property when: (a) The motor vehicle has a gross weight rating of 10,001 or more pounds . . .

49 C.F.R. § 390.5.

18. UPS considers driving commercial motor vehicles an essential function of plaintiff's job as mechanic. (Arzola Dep., p. 16; King Dep., p. 8-10)
19. As a mechanic, plaintiff drove UPS vehicles with gross weight ratings of 10,001 or more pounds as specified in the DOT definition of commercial motor vehicle. (Arzola Aff'd. ¶ 5)
20. Plaintiff and other UPS mechanics were expected and required to drive tractor trailers and package cars. A tractor trailer has a gross weight rating of 55,000 pounds. A package car has a gross weight rating of 12,000 to 20,000 pounds. (Arzola Aff'd. ¶'s 4 & 5).
21. Plaintiff and other UPS mechanics were expected and required to drive tractor trailers and package cars to perform "road tests" and "road calls." (Murphy Dep., p. 88-89; Arzola Aff'd. ¶ 5; Arzola Dep., pp. 13, 21, 43; King Dep., pp. 8-9; Sloan Dep., p. 14)
22. A "road test" is when a mechanic takes the vehicle he is working on out on the road to diagnose the problem or determine if the previously diagnosed problem has been fixed. A "road call" is when a mechanic has to deliver an operating vehicle to a driver whose package car has broken down, fix the broken vehicle, and drive

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it back to the facility, sometimes with packages on board that are traveling in interstate commerce. (Murphy Dep., p. 88-89; Arzola Dep., pp. 13, 21, 43; King Dep., pp. 8-9; Sloan Dep., p. 14; Arzola Aff'd. ¶ 6)

23. During the five weeks plaintiff worked at UPS, he performed road tests on UPS vehicles between 12 and 18 times. (Murphy Dep., p. 164)
24. Working on the night shift in Topeka, plaintiff's driving of a commercial motor vehicle would primarily be performing road calls on tractor trailers and road tests on package cars. (Arzola Aff'd. ¶ 7)
25. All of the vehicles which plaintiff worked on were commercial motor vehicles. (Arzola Aff'd. ¶ 8)
26. There were times when plaintiff was the only mechanic on duty in Topeka and the only employee available to perform road tests or road calls. (Murphy Dep., pp. 89 & 171; Arzola Dep., pp. 19, 23-24)
27. UPS expected plaintiff and other mechanics to be able to drive commercial motor vehicles on every shift they worked. (Arzola Dep., p. 21)
28. DOT regulations require that a driver of a commercial motor vehicle must be "physically qualified" and have a medical examiner's certificate. The regulations provide as follows with respect to high blood pressure:

- (a) A person shall not drive a commercial motor vehicle unless he/she is

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physically qualified to do so and . . . has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

- (b) A person is physically qualified to drive a commercial motor vehicle if that person . . .

- (6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.

49 C.F.R. § 391.41.

29. In September, 1988, the DOT issued the *Medical Regulatory Criteria for Evaluation [of High Blood Pressure] Under Section 391.41(b)(6)*, which addresses the question under Section 391.41(b)(6) of whether an individual has a current clinical diagnosis of high blood pressure that is likely to interfere with a driver's ability to operate a motor vehicle and when further tests may be necessary. (McMahon Aff'd. ¶ 2; Brown Dep., pp. 35-37, 40, 45-47)
30. The DOT *Medical Regulatory Criteria for Evaluation* provides that in order to be physically qualified to drive a commercial motor vehicle, other than a temporary

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three month certification for evaluation and treatment of mild hypertension (from 161/91 to 180/104), an individual must maintain blood pressure less than or equal to 160/90. (Brown Dep., pp. 9, 19, 35, 37, 46-47; McMahon Dep., pp. 7-8; Sloan Dep., pp. 15, 18, 20, 23-25, 34, & 40; Murphy Dep., pp. 109, 119, & 121)

31. Plaintiff's blood pressure at all relevant times was above the 160/90 standard established in the DOT *Medical Regulatory Criteria for Evaluation*. (See Stipulation in Pretrial Order)
32. Plaintiff's treating doctor testified that plaintiff will never be able to qualify for a job that requires a blood pressure reading of 160/90 or below. (Doubek Dep., p. 29)
33. Plaintiff is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep, irritability, rage, and contempt for people. (Murphy Dep., pp. 18-19)
34. Dr. Doubek testified that Plaintiff would "not be able to function" if he took medication to get his blood pressure below 160/90. (Doubek Dep., p. 23)
35. Vernon Wenger, transportation manager for the Kansas Corporation Commission, who is responsible for regulation of motor common carriers, testified that a mechanic who has driving responsibilities is required to have a DOT health card. (Wenger Dep., pp. 14, 18, 27)

Defendant's Memorandum

36. UPS requires all mechanics to take a DOT physical and secure a DOT health card prior to starting work. (Arzola Dep., pp. 22, 30, & 36; Mott Dep., p. 20, 53-54)
37. Other than the position at UPS, plaintiff has never been required to obtain DOT certification for any other job. (Murphy Dep., p. 26, 31-34)
38. On August 16, 1994, when plaintiff took his DOT physical, his blood pressure was 186/124. (Murphy Dep., pp. 74-75; Sloan Dep., p. 42)
39. Despite plaintiff's elevated blood pressure, he was issued a DOT health card by the testing clinic on August 16, 1994. (Murphy Dep., p. 80)
40. Plaintiff should have been disqualified on his initial exam and not issued a DOT health card. (Brown Dep., p. 20)
41. On September 15, 1994, while reviewing medical records, Monica Sloan, UPS Medical Services Supervisor, discovered that plaintiff's blood pressure was above the DOT standard and that his DOT health Card had been issued in error. (Sloan Dep., pp. 11-14)
42. On September 26, 1994, plaintiff's blood pressure was retested twice, and his blood pressure readings were 160/102 and 164/104, still above the DOT standard of 160/90. (Sloan Dep., p. 28; Murphy Dep., p. 117)
43. Plaintiff was terminated on or about October 5, 1994. (Complaint ¶ 4)

Defendant's Memorandum

44. Plaintiff did not request any accommodation other than requesting a waiver and time to get his blood pressure within the DOT standards. (Murphy Dep., pp. 165-167)
45. Federal DOT regulations do not allow the blood pressure standard to be waived. (Wenger Dep., pp. 25-26)
46. Plaintiff secured a mechanic job with Car Clinic approximately two weeks after his termination from UPS. The job did not require DOT certification and plaintiff currently remains employed with Car Clinic. (Murphy Dep., p. 139)

(Record 49-56)

**PLAINTIFF VAUGHN L. MURPHY'S RESPONSE
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

(R. 291)

* * *

Defendant's Memorandum

**II. RESPONSE TO DEFENDANT'S STATEMENT OF
UNCONTESTED MATERIAL FACTS**

**A. There are Genuine Issues of Material Fact whether
Vaughn Murphy has a Disability.**

1. Plaintiff has had high blood pressure since age 10. Uncontroverted.
2. Plaintiff has never had a doctor place any work restrictions on him because of his hypertension. Controverted. He has never been given any formal restrictions. He has been told by his doctor not to "exert on heavy items." (Vaughn Murphy Depo., p. 169, ln. 17 and 18)
3. For over 22 years, Plaintiff has performed mechanic jobs that did not require DOT certification without any limitation resulting from his hypertension other than the self-imposed restriction of using a lever to lift heavy objects and not running to answer the telephone. Controverted. The deposition question was not closed. Mr. Murphy's response was not exhaustive. Vaughn Murphy also testified that he cannot work over his head for long periods of time (Vaughn Murphy Depo., p. 23, ln. 7-9); the medication gives him gout which can be crippling and cause him to be in bed or a week to ten days (Vaughn Murphy Depo., p. 23, ln. 1-3); using a cart for heavy items (Murphy Depo., p. 29, ln. 18-p. 30, ln. 8), and he cannot do very heavy or heavy work (Murphy Depo., p. 161 and 162).

Defendant's Memorandum

4. Plaintiff's hypertension has not had any affect on his non-work activities other than not being able to mow the yard with a push mower and not playing activity sports such as baseball and basketball. Controverted. First of all, the questions assume that he is medicated. The regulations make it clear that the existence of an impairment is to be determined without regard to mitigating measures such as medicines or assistive or prosthetic devices. (See ¶ 2, Interpretative Guidance to 29 C.F.R. 630.2(h) and Senate Report at 23, House and Labor Report at 52, House Judiciary report at 28). Secondly, the question was not asked as an exhaustive question. He also testified how the medication could give him gout which could be crippling and put him in bed for a week to ten days. (Murphy Depo., p. 23, ln. 1-4). His medicated hypertension all substantially permits his ability to run, lift, eat, exercise, breath, hear and see. (Murphy Depo., pp. 159, 160 and 161).
5. Plaintiff's treating doctor, Dr. Debra Doubek, testified that plaintiff functions normally doing every day activity that an everyday person does. This is not a statement of uncontroverted fact. Stating that a person testified in one manner or another does not make an issue an uncontroverted statement of fact. It is controverted that Vaughn Murphy can function normally as everyone else does in the activities of daily living. It's controverted by the above statements of fact.
6. Plaintiff's hypertension does not have any affect on his everyday activity. Controverted. See above statements of fact from Vaughn Murphy's deposition.

Defendant's Memorandum

- Dr. Debra Doubek also testified that Vaughn Murphy had severe high blood pressure. She said severe high blood pressure can end organ damage such as retinal hemorrhages, retinal damage, kidney damage and heart damage. (Debra Doubek Depo., p. 9, ln. 1)
7. The only limitation Dr. Doubek may place on Plaintiff is that he not hold a job requiring repetitive lifting of 200 pounds. Controverted. She also agreed that he should be limited from very heavy or heavy work. (Doubek Depo., p. 13, ln. 25-p. 14, ln. 1)
 8. UPS's expert medical witness, Dr. Robert R. Brown, testified that Plaintiff's hypertension does not significantly restrict him as to the condition, manner or duration in which he can perform major life activities or activities of daily living as compared to the average person. Controverted. Whether Dr. Brown testified to something does not make the issue one of uncontroverted fact. As stated above there is clear evidence controverting he affects of his hypertension on his major life activities and work. Also, Dr. Brown said "Not yet" about restrictions. Also, he was not asked whether there would be any difference if he was unmedicated.
 9. Dr. Brown testified that Plaintiff should only be restricted from very heavy lifting on a very frequent basis. Once again this is not a statement of uncontroverted fact. The form of the statement is objected to as above. Assuming the statement of fact would be that Vaughn Murphy is only restricted from very heavy lifting on a frequent basis. That statement

Defendant's Memorandum

is controverted. Vaughn Murphy has testified that he should be limited from very heavy and heavy work. (Murphy Depo., pp. 161 and 162) David Couch restricted him from anything over medium which could be very heavy and heavy work. (Couch Depo., p. 39, ln. 15-p. 40, ln. 25) Dr. Doubek restricted him out of very heavy and heavy work also. (Doubek Depo., p. 13, ln. 18-p. 14, ln. 1)

10. UPS's vocational rehabilitation expert, Louis Vierling, testified that Plaintiff's high blood pressure does not limit his ability to work obtain jobs in the open labor market. Controverted. Objection, not a statement of fact in proper form. It is clearly controverted, as stated above, because he is restricted out of very heavy and heavy classes of work.
11. David Couch, the nurse who performed the DOT physical on Plaintiff testified that Plaintiff's hypertension does not affect his activities of daily living. Controverted. Objection, not a statement of fact in proper form. It is not controverted that David Couch made that statement. It is, of course, controverted that hypertension affects his activities of daily living through the statements of fact cited above.

Plaintiff also offers the following statements of fact that show that he has a disability. Having a disability means he has a physical impairment that substantially limits major life activities.

Vaughn Murphy has a physical impairment, severe hypertension. (Murphy Depo., p. 159, ln. 12 and 13; Doubek

Defendant's Memorandum

Depo., p. 13, ln. 3-17; Couch Depo., p. 11, ln. 9-p. 12, ln. 14; Brown Depo., p. 28, ln. 23-p. 29, ln. 4).

Vaughn Murphy should be restricted from activities like running or anything that would cause significant cardiac workload. (Couch Depo., p. 38, ln. 22-24; Couch Depo., p. 42, ln. 2-6)

The nature and severity of Vaughn Murphy's high blood pressure is moderately severe medicated and severe or requiring possible hospitalization unmedicated. (Couch Depo., p. 44, ln. 25-p. 45, ln. 2; Doubek Depo., p. 9, ln. 1-3)

The duration or expected duration of Vaughn Murphy's impairment is chronic and permanent. (Couch Depo., p. 45, ln. 5-8; Doubek Depo., p. 15, ln. 4 and 5)

The permanent or long-term impact of Vaughn Murphy's high blood pressure is death, organ damage to the heart, heart attack, heart failure, kidney failure, visual disturbances and stroke. (Couch Depo., p. 45, ln. 5-16; Doubek Depo., p. 9, ln. 4 and 8)

Vaughn Murphy should be restricted out of the broad classes of work that include all jobs that are designated as very heavy and heavy. (Couch Depo., p. 39 and 40; Doubek Depo., p. 13, ln. 18-p. 14, ln. 1)

*Defendant's Memorandum***B. There are Genuine Issues of Material Fact Showing that Vaughn Murphy is a Qualified Individual With a Disability.**

Paragraphs 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 42, 43, 44, 46, are all uncontroverted.

Paragraphs 17, 28, 29, 30 and 45 are controverted to the extent at they do not state a genuine issue of material fact. They are not statements of fact at all, but statements of law. They are objected to as not proper statements of fact and should be stricken. Paragraph No. 45 is a clear statement of law and not a statement of fact. It is a legal issue that has no place in a statement of uncontroverted facts in a summary judgment motion.

Paragraph 14: When Plaintiff filled out his application for employment at UPS, in addition to knowing that driving would be a required part of his job, he also knew that a condition of his employment would be taking and a passing a DOT physical and obtaining a DOT health card. This is controverted to the extent that a conditional offer of employment was made. It's clearly controverted that a conditional offer of employment was made. Vaughn Murphy has testified that at no time was he ever offered a job or offered a conditional term of employment until after he filled out the application that asked illegal health questions about whether he had a condition that required accommodation, had a condition that might put others at risk, ever received work comp or disability compensation or ever had an occupational injury. He was also asked numerous other questions about disability on August 16, 1994. (Couch Exh. No. 4, medical history form) (Murphy Depo., p. 82, ln. 24-p-83, ln. 5)

Defendant's Memorandum

Paragraph No. 20: Plaintiff and other UPS mechanics were expected and required to drive tractor/trailers and package cars. A tractor/trailer has a gross weight rating of 55,000 pounds. A package car has a gross weight rating of 12,000 to 20,000 pounds. This statement is uncontroverted. It is controverted that driving is an essential job function for Vaughn Murphy. (See job description which is Exh. 21 to Rudy Arzola Depo. and Vaughn Murphy Depo., p. 163, ln. 16-p. 164, ln. 3)

Paragraph No. 33: Plaintiff is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep, irritability, rage, and contempt for people. Clearly controverted. Vaughn Murphy has testified that 160/100 has been the best compromise between getting his blood pressure way down to 140/80 and the side effects. When he has gotten his blood pressure down to 140/80 he feels the side effects listed by the Defendant. He did not testify that he was unable to get his blood pressure own to 160/90. At this point he is very close to getting it to 160/90 but needs a minor regulation of his medication. (Murphy Depo., p. 134 and 135, 154 and 155)

Paragraph No. 34: Dr. Doubek testified that Plaintiff would "not be able to function" if he took medication to get his blood pressure below 60/90. Controverted. Again, the Defendant is making misleading statements. First of all the question is not in proper form and is objected to. How Dr. Doubek testified does not create an issue of uncontroverted fact. As stated above, Vaughn Murphy's blood pressure in the past has been down as low as 120/80 and he felt the side effects. He has not felt the side effects in the range of 160/100. Dr. Doubek clearly said that it's possible for Vaughn Murphy to get to the 160/90 range

Defendant's Memorandum

and to be able to function and not have side effects. (Doubek Depo., p. 22, ln. 8-25)

Paragraph No. 35: Vernon Winger, transportation manager for the Kansas Corporation Commission, who is responsible for regulation of motor common carriers, testified that a mechanic who has driving responsibilities is required to have a DOT health card. Controverted. Vernon Winger said, "I don't know." (Winger Depo., p. 14, ln. 2-4) It's also objected that this is not a statement of fact. It is an improper form.

Paragraph No. 40: Plaintiff should have been disqualified on his initial exam and not issued a DOT health card. Absolutely and clearly controverted. This is an issue of law and not one of fact. It is objected to and should not be considered. Vaughn Murphy followed all of the application and orientation procedure demanded by UPS for employment. He submitted to a physical, passed the physical, and obtained a DOT health card. There is no evidence that his blood pressure was consistently above 160/90. Both Dr. Doubek and David Couch have testified that it was safe for him to drive a commercial motor vehicle. (Doubek Depo., p. 17, ln. 9-13; Couch Depo., pp. 17 and 32, ln. 1-6)

Paragraph No. 41: On September 15, 1994 while reviewing medical records, Monica Sloan, UPS medical services supervisor, discovered that Plaintiff's blood pressure was above the DOT standards and that his DOT health card had been issued in error. Controverted. It's controverted that Plaintiff's blood pressure was above the DOT standard and that his health card had been issued in error. (See above statements of controverted fact)

*Defendant's Memorandum**Further Statements of Uncontroverted Fact by Vaughn Murphy.*

When Vaughn Murphy had his blood pressure checked on August 16, 1994 at Midwest Occupational Health Services, a large cuff was not used, measurements were not begun after five minutes of rest, and only one reading was taken. (Murphy Affidavit, Paragraph 3)

Driving is not an essential job function of a mechanic. (See job description marked as Exh. 21 to Arzola Depo. which does not list driving as essential job function; Vaughn Murphy Depo., pp. 163 and 164).

Vaughn Murphy was not required to take a driving test as required by drivers at UPS. (Murphy Affidavit, Paragraph 2)

* * *

(R. 309)

III. ARGUMENT

* * *

C. The Defendants Did Regard Vaughn Murphy as Disabled.

Vaughn Murphy claims that his hypertension does substantially limit his major life activities. His hypertension is severe, permanent and will ultimately result in major organ damage and death. Plaintiff also brings the alternative theory that the Defendant *regarded* him as disabled. The Defendant regarded him as disabled because he passed, all the requirements

Defendant's Memorandum

and submitted to all the tests that UPS required. He passed all the tests for mechanics and took and passed his physical. He had a DOT health card. If he was driving down the block from UPS doing a road test on a package car and was stopped by a police officer for the City of Topeka, Vaughn Murphy could have produced a commercial driver's license and a health card that allowed him to drive the vehicle. First of all, it's uncontroverted that Vaughn Murphy was fired because of his high blood pressure. Exh. 23 of Rudy Arzola's deposition states that he was fired because he "did not pass physical." But he did, in fact, pass his physical. Vaughn Murphy has testified that he was fired because of his hypertension. (Murphy Depo., p. 125, ln. 22) Vaughn Murphy has also testified that Rudy Arzola told him that he was fired because of his hypertension and said, "We can't be responsible. You might die. . . . Well, with that kind of blood pressure, you are going to die and we will be responsible." Dr. Brown, UPS's company doctor, also said, "I would say the risk is great enough I wouldn't want him to drive down the road in a very heavy vehicle." These are exactly the kind of discriminatory and stereo-typical statements, comments and points of view that the ADA is designed to stop. Just because someone has high blood pressure, doesn't mean that they are automatically going to have a stroke or a heart attack and die or that the risk is so great that that's likely to happen. That has to be evaluated on a case-by-case basis. The Defendant is not raising the defense of direct threat in this case. Vaughn Murphy was fired because of his high blood pressure. UPS thought that since he was overweight and had high blood pressure, he might kill someone if he drives. That's discriminatory, bigoted and prejudiced.

Since Vaughn Murphy had his CDL and his health card, he was perfectly able and legally entitled to drive any vehicle.

Defendant's Memorandum

The only thing that stopped him was UPS's personal determination and misinterpretation of DOT regulations. Even though he passed all their tests and had gotten a health card, they regarded him as disabled and fired him of their own accord.

* * *

(Record 291-310)